THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 57 OF 2012

(An appeal arising the from the Ruling of His Lordship Mwangutsya in HCCS No.0053 /2011 dated 27th April 2012 delivered in civil suit no.53 of 2011)

HISTORIC RESOURCES CONSERVATION

INITIATIVE & 3 OTHERS==========APPLELLANTS

VERSUS

ATTORNEY GENERAL==========RESPONDENT

CORAM

HON.MR. JUSTICE KENNETH KAKURU, JA

HON.MR. JUSTICE GEOFFREY KIRYABWIRE, JA

HON.MR. JUSTICE CHRISTOPHER MADRAMA, JA

RULING OF THE COURT

Background

This is an Appeal against the Ruling of the High Court (Civil Division) in Civil Suit No. 53 of 2011 dated 27th April, 2012 delivered by the Hon. Mr. Justice Eldad Mwangusya. The trial court found that the suit had been improperly served because the Appellants had not served statutory notice on the Respondent and ordered the plaint to be struck out.

Introduction

The Appellants who are Ugandan Non-governmental Organisations filed a suit against the Attorney General seeking a declaration that the proposed demolition of the Ugandan Museum to give way to the erection of a sixty storey East Africa Trade Centre was unlawful. They sought a permanent injunction against the Government to stop the demolition of the Uganda Museum. They alleged that the said demolition would lead to destruction of the cultural heritage of Uganda which is guaranteed by the Constitution of Uganda. During the hearing of the case the Attorney General raised a preliminary point of law that the Attorney General had not been served with statutory notice in contravention of Section 2 of the Civil Procedure (Misc. Provisions) Act (Cap 72 of the laws of Uganda). The learned trial Judge found that the failure of the Appellants to serve the statutory notice rendered the plaint incompetent and ordered that it be struck out. The Appellants being dissatisfied with this ruling lodged this Appeal.

Ground of Appeal

1. **The learned trial Judge erred in law and fact when he held that that the Appellants' suit was incompetent for not having been commenced by service of a statutory notice.**

Representations

The Appellants were represented by Mr. Ladslaus Rwakafuuzi while the Respondent Attorney General was not represented.

Since the counsel for the Attorney General did not appear, and yet there was proof of service on them on Court record, the court proceeded to hear the

matter in their absence under Rule 100 (3) of the Court of Appeal Rules which provides:

"... if the Appellant appears but the Respondent fails to appear, the Appeal shall proceed in the absence of the Respondent and any Cross Appeal by the respondent may be dismissed unless the court sees fit to adjourn the hearing..."

Duty of the court

The matter arises from a Ruling on a point of law. Even though this ground states that the learned Judge erred in law and fact we find on closer scrutiny that this ground is premised on a point of law which we shall proceed to resolve as follows;

Ground one:

The learned trial Judge erred in law and fact when he held that that the Appellants' suit was incompetent for not having been commenced by service of a statutory notice.

Submissions of counsel for the Appellant

Learned counsel for the Appellant submitted that the Civil Procedure and limitation Miscellaneous Provisions Act the law that provides for statutory notice did not include causes of actions that emanate from anticipated breach of the constitution.

In his view, service of statutory notice was only required in suits alleging damages for breach of contract or tort by government to enforce constitutional rights.

Counsel further submitted that the requirement for Statutory Notice prior to suing is contrary to **Article 28 and 139** of the Constitution which guarantees a right to a fair hearing and the original unlimited jurisdiction of the High Court respectively.

Court's finding and decision

This Appeal relates to the effect of non-service of a Statuary Notice upon the Attorney General. The Supreme Court of Uganda has recently pronounced itself on the requirement for Statutory Notice in the case of **Kampala Capital City Authority vs Kabandize Civil Appeal No.13 of 2014** and 20 others. The Court held that,

"... the rationale for the requirement to serve statutory notice was to enable a statutory defendant investigate a case before deciding whether to defend it or even settle it out of court. There was a claim that no statutory notice was served but the appellant was able to file a written statement of defence and adduce evidence in support of his defence. There was also nothing that stopped the parties from settling the case if ever a settlement was an option. This was clear illustration that failure to serve statutory notice does not vitiate the proceedings as the Court of Appeal found. A party who decides to proceed without issuing the statutory notice only risks being denied costs or cause delay of the trial if the statutory defendant was unable to file a defence because she required more time to investigate the matter."

The court went on to add that,

"... In my view the emphasis should not be on the failure to serve the statutory notice but on the consequence of the failure so long as both parties are able to

proceed with the case and court can resolve the issues which the High Court should have done after going through the hearing. Parliament could not have intended that a plaintiff with a cause of action against a statutory defendant would be totally denied his right to sue even where the defendant knew the facts and was able to file a defence as it was in this case simply because of the failure to file statutory notice..".

In his ruling the trial Judge found that the plaintiffs ought to have first served the defendant with the Statutory Notice instead of a plaint alleging a pending demolition of the museum. He found that the exceptions discussed in **Dr. Rwanyarare vs Attorney General** (Constitutional Petition No.3 of 2002 and **Greeenwatch vs Uganda Wildlife Authority** (Misc Application No.92 of 2004 did not apply. These authorities hold that where the rights and freedoms of people are being infringed or about to be infringed and there is need for court for court to take pre-emptive action in order to prevent or forestall damage from the alleged violations and therefore the need for first servicing a Statutory Notice does apply.

The trial Judge found that the action of the Appellants did not pre-empt any act of the Attorney General that would have infringed on the rights of the plaintiffs. He thus rendered the Plaint incompetent and struck it out.

In this regard, we find that the Trial Judge misdirected himself on the law relating to Statutory Notices.

We are bound to follow the decision of the Supreme Court and therefore find that failure to serve Statutory Notice did not vitiate the proceedings since the State was able to file its written defence in time. This ground succeeds.

That being said, the case before us relates to an alleged breach of the fundamental rights and freedoms of the individual which are enshrined in and protected by the constitution.

Article 50 of the1995 Constitution provides that any person, who claims that a fundamental or other rights or freedom guaranteed under this constitution had been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.

There was some debate as to which procedure should have been adopted in this dispute considering it was thought to be urgent and that is the reason why no Statutory Notice had been filed. In this case, the Appellants filed an ordinary suit for declarations and also contemptuously filed an application for a temporary injunction to stop the demolition of The Uganda Museum. We find that since this was an alleged infringement on the Appellants' rights of to enjoy their culture guaranteed by the Constitution then the Appellant ought to have brought this suit under Article 50 of the Constitution. In such a procedure, what would have been required is initiate a suit by way of notice of motion **[See Bukenya Church Ambrose vs Attorney General constitutional Appeal No. 03 of 2013].**

Alternatively, we find that the Appellants could have instituted this suit by of judicial review as provided for in Article 42 of the Constitution, which provides for remedies against administrative actions. However there is a limitation that such an application for judicial review should be made promptly and within three months from the date when the grounds of application first arose [See judicature Judicial Review Rules 2009 Rule 5 (1)].

Such procedures being of an urgent nature would not have required a prior service of a Statutory Notice upon the Attorney General.

Final Result

This Appeal succeeds with costs.

Dated this 30th day of July 2019

HON.MR. JUSTICE KENNETH KAKURU, JA

HON.MR. JUSTICE GEOFFREY KIRYABWIRE, JA

HON.MR. JUSTICE CHRISTOPHER MADRAMA, JA